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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1220

NORFOLK AND WESTERN RAILWAY, CO.,

Petitioner,

vs.

ROBERT ROCK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Supplemental Statement of the Case[1]

1. Segregation of the two yards of Norfolk Terminal resulted initially from racially discriminatory hiring practices. Both courts below found that these practices prevailed after as well as before 1965 (A-55-6, A-41, A-3), until enjoined by the district court (A-65). These practices are not just remote historical background to this case. After July 2, 1965, petitioner N & W continued to use the same pre-1965 hiring system and continued to hire mostly blacks into the Barney Yard and mostly whites into the CT

[1] This supplemental statement is made necessary because the petitioner's statement omits or mischaracterizes some of the facts pertinent to its petition.

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Yard.[2] N & W was solely responsible for this hiring discrimination (A-52, A-40).

2. Petitioner's ineffectual offer of "dovetailing" in 1968 was tardy, half-hearted, and designed to fail—which of course it did. N & W did not begin to consider proposing a merger of rosters until after respondents Rock, Johnson, and the formerly black local union, Lodge 974 ("plaintiffs"), filed their May 15, 1967, EEOC charge demanding the right to work throughout Norfolk Terminal (Pl. Ex. 36). N & W fully expected that its merger proposal of October 31, 1968, would be rejected by the union respondents, as the railway's Rules Supervisor testified (AI 607). Despite its ample knowledge of the hostility of BRT (UTU) and the white local, Lodge 550, to dovetailing or any roster merger, N & W took no steps to communicate its "offer" to the intended beneficiaries, the Barney Yard men (AI 128-29, 247). After the union's predictable rejection of the "offer" in December 1968, the railway never again raised the subject of seniority roster merger, but simply filed away the documentation of its futile offer (AI 630-31). In 1969-70 N & W and UTU engaged in 65 days of intensive collective bargaining negotiations which resulted in a new 1970 labor contract containing seniority provisions virtually identical to those N & W purportedly wanted to change in 1968 (AI 701-03, 765, 793-802). Although these negotiations were conducted by the same officials who had previously discussed the roster merger question, neither N & W nor UTU ever mentioned the merger issue during these negotiations (AI 699-700, A 701-704).[3]

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[2] See figures at p. 2, n. 2 of respondents' brief in opposition in No. 75-973.

[3] This course of conduct by N & W suggests nothing so much as a well-counselled potential litigant making a record against its co-defendant in anticipation of a liability-shifting defense. The

3. The 1968 dovetailing "offer" was in fact kept a secret from plaintiffs, as the Fourth Circuit found (see A-4). Both the local chairman and the president of Local 974 in 1968 testified that they had never heard of the purported offer until trial (AI 127-9, 247). The BRT International Vice-President in charge of responding to the offer testified that neither he nor, to his knowledge, anyone else, had told the Barney Yard men about the railway's propositions (AI 763-4). No witness—Barney Yard or otherwise—testified to the contrary.[4]

4. N & W has downplayed certain facts of lesser importance in order to appear innocent of wrongdoing or to understate the effects of its discriminatory actions. In fairness these assertions or suggestions require brief rebuttal. The full and correct facts cast N & W in a less sympathetic light. These facts are discussed in the margin.[5]

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only reasonable inference to draw from N & W's cat and mouse game is that—as the Fourth Circuit found—the railway was not serious about *accomplishing* any roster merger (as contrasted to just discussing it) (see A-7, n. 1a).

[4] Had either N & W or UTU had any such evidence, it would have obviously been to its advantage to produce that proof.

[5] (i) N & W suggests that its only discriminatory hiring practice was use of a benignly paternalistic word-of-mouth recruitment system (Pet. 6). In fact, the root of hiring discrimination was its maintenance of separate hiring offices for the two segregated yards.

(ii) N & W suggests that the local unions' leadership had "provincial interests" in opposing dovetailing (Pet. 7). While this is certainly true as to the white local, it is emphatically false as to Lodge 974, whose officers filed the EEOC charge and were plaintiffs and principal witnesses in this lawsuit.

(iii) N & W also suggests that the membership of Lodge 974 did not want dovetailing (Pet. 7). The record belies this assertion. In filing the charge of discrimination and this action, plaintiffs were carrying out the wishes of the membership to which they were responsible. Indeed, Lodge 974 is a plaintiff.

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Fairly viewed, the record as a whole portrays N & W as a typical discriminatory employer that in the years following enactment of Title VII once or twice talked about modifying its illegal policies, but in actuality did nothing.

Reasons for Denying the Writ

We note preliminarily that petitioner apparently no longer disputes the right of the plaintiff class to recover back pay in this case. Rather, petitioner's main thrust is that the other defendants should pay the award. While it lists six separate questions presented by the petition (Pet. 2-3), five of those questions boil down to the same allocation of liability issue (questions 1-5). What the petition primarily seeks, therefore, is review by this Court of an as-yet-unspecified division of an as-yet-undetermined money judgment.[5a]

(iv) N & W exaggerates the significance of the fact that a number of Barney Yard men out-earned their CT Yard contemporaries (see Pet. 7, n.2). N & W's figures are meaningless: in gross income comparisons of over 100 Barney Yard men (with a range of incomes) to over 300 CT Yard men (with a range of incomes), obviously many isolated comparisons favorable to the former can be contrived. But a fair survey of all the data shows that, with impressive consistency, CT Yard employees enjoyed higher incomes. Indeed, they averaged 17% more—nearly $1200 per man per year—than their Barney Yard counterparts (see A II 342-364, 249, 261, and especially A II 402).

[5a] The sixth question presented by petitioner challenges certain factual conclusions of the court below (Pet. 3, 21-23). We do not respond to most of petitioner's arguments on this point, since we believe them adequately refuted in our supplemental statement of the case and in our brief in opposition to certiorari in No. 75-973 at pp. 5-6.

Petitioner does raise one new point regarding the Nickel Plate merger agreement (see Pet. 22). As with back pay, consideration of this issue is premature. The Fourth Circuit simply remanded the Nickel Plate issue for initial determinations of fact by the district court in accordance with principles announced by this Court last term in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

I.

Questions as to Allocation of Liability Are Not Ripe for Review.

The district court has not entered any judgment in this case allocating back pay liability between the petitioner and co-defendant unions. In fact, the district court has not yet entered any judgment awarding back pay to any plaintiff or class member; nor has it determined the method for deciding the amounts due, the individuals in whose favor judgment will be entered, or the precise legal and factual basis for such awards. Beyond directing that some "back pay must be awarded" (A-4), the Court of Appeals left the determination of the back pay judgment entirely open for the district court under broad guidelines (A-6-A-9). With respect to allocation of the liability for an eventual back pay judgment the Fourth Circuit held only that, on the facts of this case, N & W could not completely escape liability (A-7).[6] It left the exact division of liability to "the fact finding function and the exercise of discretion . . . vested in the first instance in the district court" (A-9). The absence of a lower court judgment leaves this Court with nothing to review. To grant certiorari on the questions presented by N & W could only lead to an advisory opinion on a question neither litigated nor decided below. Denial of certiorari would remit this issue to the trial court where it belongs.

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[6] The Court of Appeals did not rule as a matter of law that employers must always pay. It simply held that an employer as guilty of discrimination as N & W must bear at least some of the financial burden (A-7, n.1a).

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II.

The Court of Appeals' Holding Presents No Novel, Important, or Unsettled Issues.

The Court of Appeals holding that petitioner cannot completely escape back pay liability presents no question worthy of review. The holding is founded on explicit findings that N & W was, to at least as great a degree as the unions, responsible for the discriminatory practices that give rise to plaintiffs' back pay claim, and that N & W had taken no effective action to mitigate the economic impact of those practices. In these circumstances, the holding is plainly correct.

A. The Purposes of Title VII Do Not Preclude a Back Pay Award Against N & W; They Require One.

The primary "prophylactic" objective of Title VII is "to achieve equality of employment opportunity and remove barriers" to them, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The statutory purpose is not to encourage empty gestures toward equal opportunity, but to require its accomplishment. "Back pay has an obvious connection with this purpose. If employers face only the prospect of an injunctive order, they would have little reason to shun practices of dubious legality," *Albermarle, supra*, 422 U.S. at 417. Apropos of this case we might add that if employers can fend off back pay liability by mere words without consequences, they would have little reason to pursue the achievement of equal opportunity—which so often entails expense and structural change. The prophylactic purpose of the Act therefore requires that employers not be

exonerated where their discrimination continues unabated despite verbal gestures toward reform.[7]

Petitioner argues that it could not have done more than it did (Pet. 14, 19). This is incorrect. The court below did not assume "that the N & W could *unilaterally* have dovetailed the seniority rosters" (Pet. 14). The court found only that to escape liability N & W "must demonstrate a more assiduous effort . . . to eliminate discrimination than has been shown here" (A-8, n. 1a). Surely, N & W could have effectively insisted on negotiating a seniority change with the unions, rather than retreating into "passive acceptance" of discrimination after its 1968 offer (*id*). Apart from the ongoing opportunity to raise any matter after 1968 and the golden opportunity presented by the prolonged collective bargaining sessions leading to the 1970 contract, N & W could have availed itself of the specific provisions of Section VI of the Railway Labor Act, 45 U.S.C. §156. That section provides an enforceable mechanism for compulsory bargaining.[8] Nothing in the Railway Labor Act's purpose

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[7] The leading cases approving back pay awards against employers —except this one—all involved employers who had partially dismantled or alleviated their discrimination practices. *See, Albemarle, supra*, 422 U.S. at 422-23; *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 873, 877 (6th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1369, 1376 (5th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 441 (5th Cir. 1974) *cert. denied* 419 U.S. 1033 (1974). But N & W changed nothing.

[8] The section provides:

> Carriers . . . shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon with 10 days after the receipt of said notice.

The provisions of 45 U.S.C. §156 impose a duty to bargain on the employee representatives, when a carrier serves such a notice. (*See* A I 698).

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requires a carrier's "passive acceptance" of discrimination or forebearance from using established RLA machinery to overcome it; and nothing in that purpose conflicts with Title VII as applied by the court below.

Petitioner asserts that the decision below would exonerate UTU despite the breach of its duty of fair representation (Pet. 14). This contention, at best premature, will surely prove wrong when the district court has allocated liability. The Court of Appeals' decision strongly suggests that the unions should share the burden of liability (A-8-A-9). Doubtless they will, in light of the facts presented here as to "whether they combined with N & W to deprive black employees of income opportunity" (A-9).[9]

B. The Fourth Circuit's Holding Does Not Conflict With Other Appellate Decisions.

N & W misstates the rule in the Fifth Circuit, in an attempt to manufacture a conflict with the Fourth Circuit's holding. The Fifth Circuit has never formulated a rule that would insulate discriminatory employers from all liability, or that would require union co-defendants to pay judgments "directly" (cf. Pet. 16). The Fifth Circuit's rule, as reflected in *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974)[10] and *Stevenson* v. *Interna-*

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[9] The only liability so far determined by the district court was for plaintiffs' attorneys' fees. The court assessed one-third of its award against the unions (A-72). This was before N & W stopped resisting plaintiffs' prayer for the basic dovetailing remedy.

[10] In *Guerra* the district court entered a joint and several judgment for back pay against all defendants, but granted the employer a judgment for its share against the union; the Fifth Circuit affirmed this allocation, 498 F.2d at 645, n.3. This is consistent with the result to be anticipated here under the Fourth Circuit's guidelines.

tional Paper Co., 516 F.2d 103 (5th Cir. 1975),[11] is the same as the Fourth Circuit's: liability should be assigned among co-defendants according to their respective responsibility for the economic injury. In *Guerra*, the court stated, "nor do we mean to suggest that employers can avoid paying for their civil rights violations by standing passively by as unions take the active role," 498 F.2d at 656. And in *Stevenson* the Court of Appeals remanded the initial allocation decision to the district court for determinations as to responsibility, 516 F.2d at 113-4. Other recent Fifth Circuit decisions are also fully consistent with the ruling below. *See, e.g., Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372, 1379 (5th Cir. 1974);[12] *Gamble* v. *Birmingham Southern R. Co.*, 514 F.2d 678, 686 (5th Cir. 1975), and *United States (Ford)* v. *United States Steel Corp.*, 520 F.2d 1043, 1060 (5th Cir. 1975);[13] and *see Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381-2 (5th Cir. 1974).[14] The

[11] In *Stevenson* the Court of Appeals suggested the possibility of reducing employer liability on a "substantial injustice" theory only for that part of the injury stemming from a government-imposed interpretation of a seniority provision which the company had previously construed in a manner without discriminatory effect. The government acted at the union defendant's behest. See 516 F.2d at 108. The possibility of separate union liability in these circumstances is obviously distinguishable from the issue presented here.

[12] In *Carey* back pay was assessed jointly against the company and union. The union was held liable despite "a thin veneer of racial neutrality" because it had not "taken the affirmative step to initiate negotiations with Greyhound" to diminish discrimination, 500 F.2d at 1379. Like N & W, the union in *Carey* unsuccessfully argued that the national labor laws prevented it from unilaterally changing the seniority system, *id.*

[13] In both *Gamble* and *Ford* the Fifth Circuit remanded to the district court for the exercise of its primary fact-finding function and discretion in allocating liability, as the Fourth Circuit did here.

[14] In *Johnson* the Fifth Circuit stated:

> [I]t would be difficult to fasten liability on one party to the labor contract which was a substantial cause of the discrim-

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Fourth Circuit in this case specifically approved these Fifth Circuit authorities and directed the district court to follow them (A-9). The two circuits stand together on the issues raised by this petition.

Petitioner also mischaracterizes the facts of this case in its attempt to create the appearance of a conflict of circuits. In arguing the purported conflict with *Guerra*, N & W relies on an irrelevant and misleading factual distinction. *Guerra*, of course, involved an employer marginally involved in the discrimination and a union that was "principally responsible," 498 F.2d at 656. N & W asserts that here, in contrast, "the employer was not responsible at all for the failure of the unions to dovetail rosters" (Pet. 16). But back pay liability arises in this case not because of the failure to dovetail, but because of the discriminatory practices causing economic injury—for which N & W bears full responsibility. To impose liability exclusively on the unions for failure to take remedial action—while exonerating the company from the consequences of discriminatory practices which created the need for a remedy—would be inequitable and punitive. Title VII requires back pay awards as compensation, not punishment, *Albermarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 422, *Johnson* v. *Goodyear Tire and Rubber Co.*, *supra*, 491 F.2d at 1382.

The case at bar bears no resemblance to state female protective law decisions, which petitioner urges conflict with the Court of Appeals holding herein (Pet. 18-19). N & W distorts the facts in arguing that it "was no less

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inatory employment practices and grant total immunity from such liability to the other party. 491 F.2d at 1381.

This logic follows the Fourth Circuit's earlier holding in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971), that "if a discriminatory contract provision is acceded to, the bargainee as well as the bargainor will be held liable."

trapped between conflicting duties under different federal statutes" than employers in those cases (Pet. 19). The Railway Labor Act did not require N & W to maintain separate, segregated yards and hiring offices, nor to construct a dual seniority system with racially discriminatory impact. Nor did the RLA preclude insistence on negotiation of seniority changes; indeed it provided a ready mechanism that N & W chose to ignore (see pp. 7-8, *supra*). The rationale of the state female protective law cases is twofold: employers had a duty to comply with state legislation until the federal courts invalidated it; and employers had a right to presume the legality of such duly enacted state legislation. Neither rationale applies here. N & W's racial practices were not statutorily mandated, and were blatantly unlawful and wrong. This court had no difficulty in rejecting the same "Scylla and Charybdis" argument of the employer in *Albermarle*, 422 U.S. at 423 n. 18. Petitioner's contention here is equally insubstantial.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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